12-1993

Technical Bulletins: Satellite Dishes: Regulation Is No Simple Task

Sid Hemsley
Municipal Technical Advisory Service

A University of Tennessee

Technical Bulletin

December 1993

Satellite Dishes: Regulation Is No Simple Task

By Sidney D. Hemsley, MTAS Senior Law Consultant

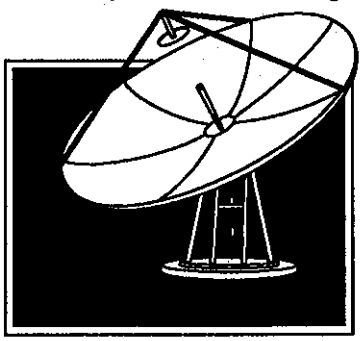
Can municipalities regulate satellite television antennas in residential and historic areas for aesthetic reasons? The answer to that question depends on the answer to two more questions. Unfortunately, the answer to neither of them comes with a money-back guarantee.

The first question

The threshold question is whether municipalities in Tennessee can even zone solely for aesthetic purposes. The answer is a qualified yes. The Tennessee Supreme Court in *State of Tennessee v. Smith*, 618 S.W.2d 474 (1981) upheld state statutes regulating junkyards near highways and declared that:

> "... in recent years most courts which have considered junkyard regulations similar to those involved here have had no difficulty in sustaining them as a proper exercise of the police power of a state or local government, even if scenic or aesthetic consideration have been found to be the only basis for their enactment. (Citations omitted). ... Although some authorities to the contrary may be found, we find these cases to be better reasoned and in more accord with modern concerns for environmental protection, control of pollution and prevention of unsightliness. We believe that the views expressed in *City of Norris v. Bradford* (which earlier held that municipal regulations couldn't be based solely on aesthetics) must be considered in the light of the facts of that case and that they cannot be literally applied to all of the myriad concerns and problems facing state and local governments at this time. ... We therefore are of the opinion that in modern society aesthetic considerations may well constitute a legitimate basis for the exercise of police power, depending upon the facts and circumstances."

That language isn't carte blanche for blanket municipal regulations banning satellite dishes from front yards and rooftops and towers in **every** residential neighborhood, and entirely from historic areas. However, it does give municipalities a state legal foundation supporting **some** regulation of satellite dishes in those residential and historic areas where looks **do** matter — depending on the facts and circumstances. That foundation might even support a complete ban on satellite dishes in certain historic areas, and perhaps other areas of a municipality, depending upon the character of the area in question, and what aesthetic interests the municipality is attempting to promote.



The second question

Does the regulation of satellite dishes comply with the Federal Communications Commission (FCC) rules governing municipal regulation of **antennas**? This question has proved legal quicksand for municipalities.

The FCC regulations

FCC Report DC-362, dated Jan. 14, 1986, outlines an FCC rule that limits municipal restrictions on the location of satellite dishes. That rule says that state and local zoning or other regulations that differentiate between television receive-only (TVRO) antennas and other types of antenna facilities are pre-empted **unless** they pass a two-pronged test. They must:

1. have a reasonable and clearly defined health, safety, or aesthetic objective; and
2. not impose unreasonable limitations on, or prevent, reception by TVROs of a satellite-delivered signal, or impose costs on the users of such antennas that are excessive in light of the purchase and installation cost of the equipment (47 C.F.R., Sec. 25.104 (1988)).

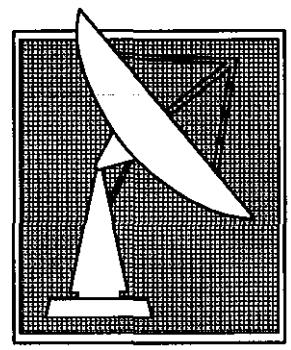
Cities lose most satellite dish cases

Several recent federal and state cases have applied the FCC rule to local zoning limitations on the location of TVROs. The pioneer is *Van Meter v. Township of Maplewood,* 696 F.2d 1024 (D.N.J. 1988). In this case, some New Jersey property owners installed a TVRO dish antenna 10 feet in diameter on their roof. A zoning ordinance limited receiving dish antennas to 6 feet high, limited them to the back yard within minimum setbacks from property lines and buildings, and required them to be screened from view by evergreen plantings 6 feet high. It entirely prohibited transmitting dish antennas. The installer testified that the roof installation was necessary to enable the property owners to receive signals from **all** available satellite television channels.

The U.S. District Court for New Jersey found that the zoning ordinance **impermissibly differentiated between receiving and transmitting dish antennas** by forbidding use of the latter; it did not apply to UHF and VHF antennas, FM and radio short wave antennas. Under the FCC regulations, the zoning ordinance was pre-empted, **unless** it complied with the two-pronged test.

In the court's mind, the ordinance satisfied the first prong of the FCC rule. It didn't contain a "clearly defined health, safety, or aesthetic objective," but the court inferred one; it was designed to reduce the visual impact of satellite dishes (an aesthetic interest), and the prohibition on roof installation and the height limitation promoted safety.

But the ordinance failed to satisfy the second prong because it placed an unreasonable burden on reception. While the FCC rule didn't entitle the plaintiff to receive "all" the available satellite television channels, said the court, "... it is clear that the ordinance functions as an unreasonable burden on reception because **its provisions make reception technically impossible and because it is generally insensitive to the unique conditions that govern signal reception on any given site**" (emphasis is mine).

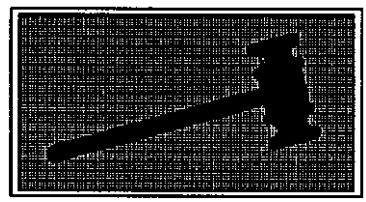


From that perspective, the ordinance was defective in several areas. It limited the size of the dish to 6 feet in diameter, but a dish 10 feet in diameter angled at the required elevation would exceed that limitation. Its requirement that antennas be screened from view with evergreens 6 feet in height was insensitive to the impact of shielding on the antenna's "reception window." The configuration of some lots might prohibit effective screening that would still permit effective reception, and some screening might cost far in excess of investment in television reception equipment. Finally, it didn't provide for alternative installation sites for satellite dish users where a rear lot installation resulted in no signal reception or diminished signal reception. A total prohibition on roof installation was generally unreasonable.

Subsequent federal and state cases have **not** followed *Van Meter* on the first prong of the FCC test. Instead of merely inferring a clearly defined health, safety, or aesthetic objective in the satellite dish ordinance or regulation, they have required the ordinance or regulation to **expressly** contain such an objective. Lacking an express objective, the ordinance fails the first prong of the test. But the same cases **have** essentially followed *Van Meter* in determining whether the ordinance or regulation passes the second prong

for satellite dishes that could not comply with the ordinance.

Similar results for essentially the same reasons can be seen in *Village of Elm Grove v. Py*, 724 F.2d 612 (E.D. Wis. 1989); *Hunter v. City of Whitley*, 257 Cal. Rptr. 559 (Cal. App. 2d. 1989); and *Nationwide v. Zoning Board of Adjustment*, 578 A.2d 389 (N.J. Super. A.D. 1990). For reasons not explained in the latter case, the plaintiffs didn't argue that the ordinance failed the first prong, although it was based on the Haddon Heights, N.J., Borough Council's finding that "... unless regulated, dish antennas can be installed in such a manner as to make them aesthetically unpleasant, with an adverse impact on surrounding property value."



Limited or partial bans on satellite dishes

Conceivably, the FCC rule would permit a municipality to simply prohibit all antennas in front yards, on roofs, or other locations, or to enact a blanket ban on **all** antennas within the municipality. Indeed, one FCC commissioner dissented in part from the FCC rule on the premise that it permits municipalities to do exactly that. Nothing in the above cases suggests otherwise. But it's difficult to be comfortable with that reading of the FCC rule. FCC Report No. DC-362 says:

> "Nonfederal regulations may impose, under our adopted rule, reasonable requirements on all antennas as long as these local standards are uniformly applied and do not single out satellite receive-only facilities for different treatment. An ordinance attempting to regulate all antennas by enacting restrictions on those of a certain shape, for example a ban on all spherical antennas, would differentiate between satellite antennas and other types of facilities and therefore would be pre-empted under our rule. Communities wishing to preserve their historic character may limit the construction of 'modern accoutrements' provided that such limitations affect all fixed external antenna in the same manner. In adopting this rule we intend that it be a valid accommodation of local interests as well as of two federal interests, namely promoting interstate communications and historic preservation. Communities which are truly concerned with preserving their unique historic character may do so if they do not discriminate against satellite receive-only antennas." (Paragraph 31, pages 15-16.)

The FCC position is ambiguous on the question of whether limited or complete total bans on antennas are permissible. It begins by speaking not of bans but of "reasonable requirements" and concludes with a suggestion that fixed external antennas might be totally banned to preserve the historic character of a community.

Unfortunately, the report goes no further in enlightening its readers on that question. However, given the pervasiveness of television as a public information and communications media, such bans probably raise First Amendment issues the courts would likely resolve in favor of the antennas, except perhaps where unique local interests are at stake, such as the preservation of historic communities or neighborhoods.

The preservation of historic districts became an issue in *Olsen v. City of Baltimore*, 582 A.2d 1225 (Md. 1990). A property owner's satellite dish size and roof installation violated a Baltimore city ordinance. The property owner argued that the ordinance discriminated against satellite dish antennas and that it failed both prongs of the FCC test. It is clear that the Maryland Court of Appeals would have agreed with him had the case turned on the ordinance.[1] But the court pointed to a separate Montgomery County Urban Renewal Plan that prohibited satellite dish roof installations but didn't discriminate against satellite dishes. The plan said that:

> "Antennae, air conditioning equipment, grills, roof decks, satellite dishes, and other contemporary elements shall not be visible from any front or side elevation or visible from any point of the street unless otherwise approved by the Commissioner of the Department of Housing and Community Development."

[1]Another challenge to that ordinance is pending. (See *Esslinger v. Baltimore City*, 622 A.2d 774 (Md. App. 1993)).

The property in question was in the Federal Hill National Historic District. One of the objectives of the Urban Renewal Plan was to "preserve and enhance the historical and architectural charter of the neighborhood and structures." The court never had to reach the question of whether the plan's antenna restriction passed both prongs of the FCC test because it didn't discriminate against satellite dish antennas; had it done so, that language might have helped it over the first prong. (The satellite dish was 10 feet wide; it was mounted on a townhouse 11-1/2 feet wide). As it was, Paragraph 31, pages 15-16 of the FCC report became a leg the court used to support the antenna ban in the historic district.

What should a city do?

That is where the law stands governing the regulation of TVROs by municipalities. It compels a municipality to do three things to satisfy both state and federal law governing aesthetic regulation of such antennas:

- First, the municipality must determine whether its regulations discriminate against TVROs. If they do, they are pre-empted by the FCC regulations **unless** the municipality can demonstrate that its regulations pass the two-pronged FCC rule test. So far, that has been a tough job for municipalities.
- Second, the municipality must determine whether its regulations pass the first prong of the test. That is done by making sure that strong aesthetic reasons support **each** specific antenna regulation. Firmly identify the aesthetic reasons in the regulation. Remember also that under both state and federal law such regulations might also be enacted and defended on public safety and health grounds. That may help municipalities relative to rooftop, tower, and other antenna locations susceptible to high winds and other adverse weather conditions.
- Third, the municipality must determine whether its regulations pass the second prong of the test. The regulations cannot unreasonably interfere with TVRO reception or impose unreasonable costs on the property owner. In that connection, make sure that the antenna regulations provide an escape hatch for property configurations and peculiarities that make it either completely impossible for an antenna installation on the property to comply with the ordinance, or impossible for an antenna installation on the property to comply with the ordinance **and** to receive an adequate signal.

The Municipal Technical Advisory Service (MTAS) is a statewide agency of The University of Tennessee's Institute for Public Service. MTAS operates in cooperation with the Tennessee Municipal League in providing technical assistance services to officials of Tennessee's incorporated municipalities. Assistance is offered in areas such as accounting, administration, finance, public works, communications, ordinance codification, and waste-water management.

MTAS *Technical Bulletins* are information briefs that provide a timely review of topics of interest to Tennessee municipal officials. *Bulletins* are free to Tennessee local, state, and federal government officials and are available to others for $2 each. Contact MTAS for a list of recent *Bulletins*.

The University of Tennessee
Municipal Technical Advisory Service
600 Henley Street
Suite 120
Knoxville, Tennessee 37996-4105

Authorization No. E14-1050-00-001-94